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No. 00-1031

IN THE

Supreme Court of the United States

Stephen G. Lady,

Petitioner,

v.

Outboard Marine Corp.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. *Moore* is Still Good Law, and Directly Conflicts with the Decision Below 1

2. This Court has Not Already Resolved the Preemption Issues Presented in *Lewis* 5

3. OMC's Bankruptcy is Not a Reason to Deny the Writ 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 3

Geier v. Am. Honda Motor Co., 529 U.S. 861, 120 S. Ct. 1913 (2000) ..... *passim*

Lewis v. Brunswick Corp., 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998) ..... *passim*

Medtronic v. Lohr, Inc., 518 U.S. 470 (1996) 4, 5

Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246 (Tex. 1994) ..... *passim*

United States v. Locke, 529 U.S. 89, 120 S. Ct. 1135 (2000) 6

Statutes and Regulations:

Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. V. 1993) 1

11 U.S.C. § 362(a)(1) 7

15 U.S.C. § 1397(k) 3

46 U.S.C. § 4311(g) 3

36 Fed. Reg. 15764-65 (1971) 5

Miscellaneous:

Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288) 4, 6

ARGUMENT

As explained in our petition for *certiorari*, this case presents the identical question of law that was before this Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether a state common-law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. V. 1993) ("Boat Safety Act" or "Act"), and by a decision of the United States Coast Guard not to begin developing a regulation that would require the use of propeller guards on recreational motor boats. *Lewis* settled after oral argument, before any decision was rendered in the case. This is the first opportunity for this Court to revisit this important question of federal law in the wake of *Lewis*.

OMC's main theme in opposition is that review should not be granted because decisions of this Court since *Lewis* was argued – particularly, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861,120 S. Ct. 1913 (2000) – have solved the core questions presented in this case, validated the various federal court of appeals decisions finding preemption of no-propeller-guard claims like petitioner's, and "discredited" the conflicting decision of the Texas Supreme Court in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994). OMC also claims that its recent filing of Chapter 11 bankruptcy is an independent reason why review should be denied. As we now explain, these arguments are meritless.

1. *Moore* is Still Good Law, and Directly Conflicts with the Decision Below.

OMC's central argument is that "there is no split of authority on the question" presented in this case because *Moore*

"did not issue an implied preemption holding and, in any event, premised its discussion of implied preemption on cases and theories this Court has since explicitly rejected." Opp. at 14. OMC is wrong on both counts.

First, *Moore* unquestionably *did* reach the question of whether no-propeller-guard claims are impliedly preempted by the Coast Guard's regulatory inaction. *Moore* begins with a discussion of express preemption under the Boat Safety Act, concluding that Congress did not expressly intend to preempt any common-law damage claims. *See* 889 S.W.2d at 248-51. The decision then addresses the same implied conflict preemption question presented here: whether "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's policy determination that guards should not be mandated." *Id.* at 251.

On this point, the Texas Supreme Court reasoned, first, that "the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer – installing guards on future boats or taking no action and bearing the liability as a cost of doing business." *Id.* at 251 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)). *Moore* then observed that a conflict with the Coast Guard's regulatory goals was unlikely given that the Propeller Guard Subcommittee Report issued by the Coast Guard's Advisory Council "mentions that manufacturers have been sued for failing to install propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case of manufacturer liability in some states." *Id.* at 252.

Finally, the Texas Supreme Court found that common-law claims could not reasonably be viewed as conflicting with Congress's purposes in light of the Boat Safety Act's broadly worded savings clause. *See id.* at 252. For all these reasons, *Moore* concluded that, although "[w]e recognize the potential for conflict, [we] do not think it justifies a holding of preemption." *Id.* at 251-52.[1]

Nor is OMC right in claiming that *Moore* was "discredited" by this Court's recent decision in *Geier v. Am. Honda Motor Co.*, 120 S. Ct. 1913 (2000). First, *Geier* held that the presence of a broadly worded savings clause in the National Traffic and Motor Vehicle Safety Act of 1966 (the "Motor Vehicle Safety Act"), 15 U.S.C. § 1397(k), precludes any finding of express federal preemption. *See* 120 S. Ct. at 1918. This is squarely in accord with *Moore*'s conclusion that the Boat Safety Act's similarly-worded savings clause, 46 U.S.C. § 4311(g), prohibits any finding that Congress intended expressly to preempt common-law claims. *See* 889 S.W.2d at 249-51. Second, regarding implied conflict preemption, *Geier* held that a common-law claim that an automobile was defective because it lacked an airbag conflicted with a complex federal regulation that was carefully designed to "bring about a mix of

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[1] In the face of this holding, OMC points to a footnote in which *Moore* observed that, pursuant to this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), "a number of federal circuit courts have questioned the propriety of an implied preemption analysis when presented with an express preemption clause." *Id.* at 252 n.10 (citing cases). *Moore* went on to state, however, that "[f]or purposes of this discussion . . . we address Mercury's implied preemption claims." *Id.* OMC's characterization of *Moore*'s subsequent discussion of conflict preemption as mere dicta is insupportable.

different devices introduced gradually over time." *See* 120 S. Ct. at 1922. On this latter point, this Court's holding was narrowly confined to the particular regulation at issue, and has no bearing on whether a no-propeller-guard claim like petitioner's would conflict with the U.S. Coast Guard's regulatory *in*action regarding propeller guards.[2]

At the same time, in one key respect that goes unmentioned by OMC, *Geier* confirms that the Texas Supreme Court got it exactly right. In *Geier*, the United States had filed an *amicus curiae* brief arguing that no-airbag claims would conflict with federal regulatory purposes. This Court ultimately deferred to that position, holding that the United States' interpretation of the preemptive effect of agency action is entitled to "special weight." *Geier*, 120 S. Ct. at 1926, 1928. What OMC conveniently fails to emphasize is that, in *Lewis v. Brunswick*, the United States filed an *amicus curiae* brief arguing that claims exactly like petitioner's do not conflict with any federal purposes, and thus are not preempted by federal law. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288). Under *Geier*, as well as numerous prior decisions of this Court, *see, e.g., Medtronic v. Lohr, Inc.*, 518 U.S. 470, 496, 505-07 (1996) (majority and concurring opinions), the United States' *amicus* brief in *Lewis* is entitled to deference on this point. To date, however, the Texas Supreme Court stands alone against a host of federal courts of appeals in

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[2] OMC makes much of the fact that *Geier* "made clear that the presence of an express preemption clause does not alter in any way a court's obligation to undertake a full implied preemption analysis," Opp. 19-20, claiming that this holding invalidates *Moore*. As explained above, however, *Moore did* reach the question of implied conflict preemption, and thus its ruling is undisturbed by *Geier*.

holding that no-propeller-guard claims are not preempted by federal law. *See* Pet. App. at 5-6. Thus, not only does *Geier* not discredit *Moore*, but it provides further reason to grant review and accord the United States' authoritative position the deference it deserves.[3]

2. This Court has Not Already Resolved The Preemption Issues Presented in *Lewis*.

Nor is OMC correct in claiming that this Court "has already resolved the preemption issues presented in *Lewis v. Brunswick Corp.*" Opp. at 20-22. To support this argument, OMC selectively quotes from the preliminary questions presented in the *Lewis* petition for *certiorari*, which included

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[3] OMC claims that the United States' position in *Lewis* is not entitled to any weight because (1) the agency itself did not "join[ ] the brief"; and (2) "the Coast Guard has consistently taken the position that the [Act] preempts tort claims like [petitioner's]." Opp. at 18. The first argument is sophistry, as it requires a Court to infer from the absence of a signature that an agency (which is, after all, a part of the United States) actually means something other than what the United States says it means. OMC cites no authority to support this novel theory of agency deference. (Deference to the *Lewis* brief is particularly appropriate, moreover, given that the Coast Guard is *ceding* authority to the states, not trying to claim power for itself. *See Medtronic*, 518 U.S. at 496 (according "substantial weight" to agency position that regulations do not preempt common-law claims)). OMC's second claim simply lacks any evidentiary support, as it is based solely on certain Coast Guard regulations promulgated after the Boat Safety Act's enactment, *see* 36 Fed. Reg. 15764-65 (1971), that granted a blanket exemption from preemption for then-existing state and local laws on recreational boats. *See* Opp. at 18. Contrary to OMC's suggestion, these regulations do not even mention tort claims. There is accordingly no reason to suppose that the Coast Guard ever viewed common-law claims (as opposed to state legislation and regulations) as falling within the scope of the Act's preemption provision.

several generic issues relating to implied preemption. *See* Opp. 21. However, the merits briefs in *Lewis* fully addressed whether no-propeller-guard claims are either expressly preempted by the Boat Safety Act or impliedly preempted by the U.S. Coast Guard's decision not to regulate propeller guards. *See Lewis v. Brunswick Corp.*, No. 97-288.[4]

The express preemption question has arguably been answered by *Geier*, which held that a similarly-worded savings clause that explicitly preserves common-law claims precludes a finding of express preemption under the Motor Vehicle Safety Act. *See supra* at 3. However, as explained above, *Geier* did not even come close to answering the implied conflict preemption question presented in this case, except insofar as it reaffirmed that the United States' position on the preemptive effect of agency actions is entitled to deference – a teaching that the lower court chose to ignore.[5]

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[4] The Solicitor General's brief in *Lewis* included the following Question Presented:

> Whether petitioners' state common law tort action, based on the respondent's failure to install a propeller-guard on a motorboat, is preempted by the Federal Boat Safety Act of 1971 . . . or by the decision of the Secretary of Transportation to take no regulatory action to require the installation of propeller guards on recreational boats.

Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288) at (I).

[5] OMC suggests that this Court's ruling in *United States v. Locke*, 529 U.S. 89, 120 S. Ct. 1135 (2000), may have helped resolve this issue, insofar as it held that there is no presumption against preemption of state positive law regulation of ocean-going oil tankers involved in international maritime commerce. *See* Opp. at 13. As explained in our petition, however,

Nor can it reasonably be said (as does OMC) that this case is not worthy of review because the lower court decision was "extremely narrow." Opp. at 14-15. In reality, the Fifth Circuit's decision could have extremely broad ramifications given that it affords preemptive effect to an agency's decision *not to issue regulations* governing a particular safety device. Under this approach, the mere fact that an agency decides to study a particular device or technique, but ultimately decides for whatever reason not to issue any federal regulations, could automatically wipe out the rights of citizens to seek compensation through the common law. If this result could obtain under a statute like the Boat Safety Act, where Congress took pains to make clear that common-law claims were to be expressly *preserved* and where the United States itself has taken the position that tort claims do not conflict with federal law, then it is hard to imagine where the lower court's reasoning could find a logical stopping point. It is therefore disingenuous to assert that, due to the "narrow[ness]" of its reasoning, the Fifth Circuit's decision is not worthy of review.

3. OMC's Bankruptcy is Not a Reason to Deny the Writ.

Finally, OMC cites its recent filing of Chapter 11 bankruptcy as an independent reason why the writ should be denied. Opp. 22-24. Notably, OMC does not attempt to claim that this Court lacks jurisdiction to hear this case, or that the automatic stay provision of 11 U.S.C. § 362(a)(1) precludes this Court from considering the merits of this petition. Rather, it

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there are myriad reasons why it would make no sense to apply *Locke*'s holding to a case involving a small recreational vessel on local waters. *See* Pet. at 22-23.

argues: (1) that Lady should have filed a motion for relief from the automatic stay in the United States Bankruptcy Court for the Northern District of Illinois (Opp. 22); and (2) that its bankruptcy filing renders this case an "exceedingly poor vehicle" for this Court's review because a remand to the district court for a trial on the merits would be "extremely disruptive to OMC's efforts to reorganize." Opp. at 23. Neither claim is worthy of serious consideration.

First, OMC's argument that the petition should be denied because Mr. Lady has not yet moved for relief from the stay is diversionary. Petitioner has not yet sought relief from the bankruptcy stay because this Court ordered OMC to file an opposition to the petition for *certiorari*.[6] There was no reason to take any further action at this stage given that the proceedings in this Court are ongoing, and could effectively terminate petitioner's litigation against OMC. Petitioner will, however, seek relief from the stay when and if such action becomes appropriate.

OMC's claim that review is not warranted because ongoing litigation following a remand from this Court would be "disruptive and distracting" is equally weak. If review is granted here, this Court will simply decide whether petitioner's claims are subject to a preemption defense, not whether no-propeller-guard claims should succeed on the merits. What

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[6] On January 16, 2001, OMC filed a notice of waiver of its right to file an opposition in this proceeding, citing its recent filing of Chapter 11 bankruptcy. The was the first time that petitioner was made aware of the bankruptcy petition, which was filed on December 22, 2000 (the same day our petition for *certiorari* was filed with this Court). By letter dated January 23, 2001, the Clerk of this Court directed OMC to answer the petition notwithstanding the bankruptcy proceedings.

happens *after* this Court rules is irrelevant to the question of whether this case presents a solid vehicle for review of the preemption question. In addition, if petitioner succeeds here, and this Court remands the case for further proceedings, OMC will have ample opportunities to seek to enforce the bankruptcy stay in accordance with applicable standards. Thus, the "distraction" posited by OMC is an argument appropriately made later, if at all, and to the courts below, not this Court.

At bottom, OMC's bankruptcy-based arguments are nothing more than an attempt to avoid any future liability for no-propeller-guard claims like petitioner's. As noted above, the vast majority of federal courts of appeals have concluded that such claims are preempted by the Coast Guard's regulatory inaction. Unless and until the preemption question is decided by this Court, OMC may not have to compensate any of its propeller-guard victims, either in or out of bankruptcy. There is no need to wait for "another opportunity" to decide the issue presented here, and fundamental fairness counsels in favor of this Court deciding it now.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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